

1988

State of Utah v. Dean Keith Hickman : Brief of Appellant

Utah Supreme Court

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David Yokum; Attorneys for Respondent.

Dean Keith Hickman; Attorney Pro Se.

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UTAH SUPREME COURT

BRIEF

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DOCKET NO:

880362

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

:

Plaintiff/Respondent, :

-vs-

:

CASE NO. 880362

DEAN KEITH HICKMAN,

:

Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from order denying the Defendant/Appellant's motion to withdraw his plea of guilty entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, in criminal case number CR-84-1436, the Honorable Scott Daniels, presiding judge.



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FILED
NOV 1 1984

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :

Plaintiff/Respondent, :

-vs-

: CASE NO. 880362

DEAN KEITH HICKMAN, :

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, : **BRIEF OF APPELLANT**

Plaintiff/Respondent, :

-vs-

: CASE NO. 880362

DEAN KEITH HICKMAN, :

Defendant/Appellant. :

STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal is pursuant to Rule 3 and Rule 4 of the Rules of the Supreme Court of the State of Utah.

STATEMENT OF ISSUES

The Statement of Issues raised on appeal are whether the plea of guilty entered by the Defendant/Appellant was involuntary and inappropriately taken by the Trial Court, and that the Defendant/Appellant was also not appropriately advised within Boykin v. Alabama, 395 U.S. 238, 243, 244 (1969), Brady v. United States, 397 U.S. 742 (1970), State v. Gibbons, 60 Utah Adv. Rep. 36 (June 30, 1987), and State v. Vasilacopulos, 756 P.2d 92 (Utah App. 1988) Cert. denied (9-21-88).

STATEMENT OF CASE

That the above named Defendant/Appellant filed a motion to withdraw his plea of guilty in July, 1988. The Defendant/Appellant is in belief that the Honorable Scott Daniels, presiding judge of the Third Judicial District Court, erred by not informing the Defendant/Appellant of all the consequences involved in the entrance and acceptance of such a plea of guilty on January 18,

1985. Furthermore, the Trial Court failed to comply with the Utah Code of Criminal Procedure, Rule 11(e), Section 77-35-11, Pleas (e)(4)(6)(f), when it accepted the Defendant/Appellant's plea of guilty to the charge of aggravated robbery, a felony of the first degree.

SUMMARY ARGUMENT

The Defendant/Appellant, by virtue of the following conviction obtained and entered against him as a result of a plea bargain agreement, resulting in the entrance and acceptance of a plea of guilty before the Honorable Scott Daniels, presiding judge of the Third Judicial District Court, in criminal case number CR-84-1436, for the crime of aggravated robbery, a felony of the first degree, on January 18, 1985.

Also, on January 18, 1985, the Defendant/Appellant was sentenced by the same aforementioned Court to serve a term of imprisonment in the Utah State Prison for no less than five years and no more than life in criminal case number CR-84-1436, for the crime of aggravated robbery, a felony of the first degree.

ARGUMENT

That the Honorable Scott Daniels, presiding judge of the Third Judicial District Court, in and for the county of Salt Lake, State of Utah, erred in his acceptance of the guilty plea entered by the Defendant/Appellant in criminal case number CR-84-1436, in count number 3, for the crime of aggravated robbery, a felony of the first degree. The Utah Code of Criminal Procedure only allows for the following under Section 77-35-11, Rule 11 - Pleas (e)(4)(6)(f) of the statute, and the pertinent part states:

(e) The court may refuse to accept a plea of guilty or no contest, and shall not accept such a plea until the court has made the findings:

(4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;

(6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and, if so, what agreement has been reached. If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same shall be approved by the court. If the recommendations as to the sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to the sentence is not binding on the court.

(f) The judge shall not participate in plea discussions prior to any agreement being made by the prosecuting attorney, but once a tentative plea agreement has been reached which contemplates entry of a plea in the expectation that other charges will be dropped or dismissed, the judge, upon request of parties, may permit the disclosure to him of such tentative agreement and the reasons therefore in advance of the time for tender of plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition. Should (it) not be handled in conformity with the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea. (1983)

Also, the Utah Code of Rules of Practice only allows for the following under Rule 3.6, Pleas of Guilty, which states in the pertinent part:

Upon entry of a plea of guilty to a criminal charge, before acceptance thereof, there must be substantial compliance with the following:

(A) Admonition of Defendant

The court shall not accept a plea of guilty without first making certain that the defendant understands the following:

[1] The nature of the charge.

[2] The minimum and maximum sentence prescribed by law, including when applicable, the penalty to which ;the defendant may be subject, including any consecutive sentences, if given.

[3] That the defendant has a right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty;

(B) Determining Whether the Plea Is Voluntary

The court shall not accept a plea of guilty without first determining that the plea is voluntay, if the tendered plea is a result of a plea agreement, the agreement shall be stated and confirmed in open court. The court shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(C) Determining Factual Basis for Plea

The court shall not enter final judgement on a plea of guilty without first determining that there is factual basis for the plea, and that all requirements of law for acceptance of a plea of guilty have been met.

(D) Use of Affidavit of Defendant

The court may establish the foregoing requirements in the record by use of a written affidavit executed by the defendant before the court, the substance of which shall be in substantially the form as contained in the "affidavit of defendant" form.

The Addendum copy of the "affidavit of defendant" dated on January 18, 1985, clearly shows that the Honorable Scott Daniels, presiding judge of the Third Judicial District Court, in and for the county of Salt Lake, State of Utah, erred in his acceptance of the guilty plea entered by the Defendant/Appellant as previously

stated above. It was the responsibility of the Trial Court to notify the Defendant/Appellant of all the facts and the consequences the Defendant/Appellant would face on the entrance of a plea of guilty within the meaning of the Utah Code of Criminal Procedure, Section 77-35-11, Rule 11 - Pleas (e)(4)(6)(f), and also under the Utah Code of Rules of Practice, Rule 3.6, Pleas of Guilty (A)(B)(C)(D), and finally, the effect and the consequences the Defendant/Appellant's plea of guilty would have upon him at the time of sentencing.

A plea of guilty must be entered into freely, voluntarily and understandingly by one fully competent and aware of the consequences thereof. Such a plea of guilty must be entered free from threats, promises and inducements.

The record in the instant case at bar clearly establishes, as shown in the attached copy of the "affidavit of defendant," that the Defendant/Appellant's plea of guilty was entered involuntarily as a result of the Trial Court's error, by failing to comply with the appropriate statutes of state law concerning the acceptance of guilty pleas, including inducements, and promises as well as threats.

The following exchange occurred between the Honorable Scott Daniels, presiding judge of the Third Judicial District Court, and the Defendant/Appellant at the Defendant/Appellant's change of plea hearing on January 18, 1985, as follows:

THE COURT: We'll return, then, to State of Utah verses Dean Keith Hickman.

MS. WELLS: Your Honor, Brooke Wells appearing on behalf of Mr. Hickman who is present.

THE COURT: All right. Are you Mr. Dean Keith Hickman?

MR. HICKMAN: Yes, sir.

THE COURT: Have you had an opportunity to talk with your attorney, Ms. Wells, before the hearing?

MR. HICKMAN: Yeah.

THE COURT: And are you ready to enter a plea at this time?

MR. HICKMAN: Yes, sir.

THE COURT: Is there going --

MS. WELLS: There will be a plea that we will ask the Court to accept, Your Honor. At this time we are asking the Court to accept Mr. Hickman's plea to Count III of the Information which is presently before it. That will be a plea of guilty to Count III, which is Aggravated Robbery, a First Degree Felony. In exchange for Mr. Hickman's plea of guilty, we anticipate that the State will do the following.

First, that is will amend the information that is presently before the Court to indicate that the aggravated robbery, which Mr. Hickman is entering a plea to, would have been committed with a deadly weapon, but will not specify that weapon was a firearm. My affidavit so indicates at this time.

We also anticipate that the State will move to dismiss Counts I and II of the Information before it. That the State will file no other cases presently known to it. And that another case which was -- preliminary hearing was held at the same time this one was out of West Valley City, will be dismissed. Unfortunately because I was in trial, I don't have that other file number with me. It has not come up for arraignment in the District Court. But I think we can be specific enough about it on the affidavit that we know which case it is.

UNKNOWN SPEAKER: I can give you the Circuit Court--

MS. WELLS: Perhaps the Circuit Court number would, at least--

MR. D'ELIA: Your Honor, on that, our office is in the process of looking it up, was going to call to give the District Court number.

THE COURT: All right. Let me ask you a few questions,

then, Mr. Hickman. As I understand it, you're going to plead guilty to the charge of Aggravated Robbery, a First Degree Felony. If I have it right, that is punishable by a maximum sentence of a life sentence no less than five, no more than life in the Utah State Penitentiary and a fine of \$15,000.

MS. WELLS: Ten thousand dollars.

THE COURT: Ten thousand dollars or both, the fine and the prison sentence. And even though they are amending their complaint to delete the language about the firearm, I suppose he could be sentenced--

MS. WELLS: No, Your Honor, that is the reason for the amendment at this time. The statute states that where a firearm is used, that there is a mandatory enhancement which this Court must sentence the Defendant to. We are asking the Court to accept the State's amendment to avoid that enhancement clause, and that's the reason for the amendment.

THE COURT: But isn't the sentence based on whether a firearm is used, not on what the State charges in the Information?

MS. WELLS: I don't believe so. And that would be based upon proof that may or may not have come out at the preliminary hearing. But where the State amends that, it would be similar to our being involved in some of the minimum mandatory cases charging sexual offenses. If the State amends out the language which requires the minimum mandatory or in this case the enhancement, then the Court, I don't believe, has that privilege. Is that your understanding?

MR. D'ELIA: Your Honor, that's my understanding, if a firearm is not specifically alleged, Your Honor, over to a deadly weapon, the enhancement--

THE COURT: All right. So you could be sentenced to as much as five in [sic] life in the Utah State Penitentiary, \$10,000. fine, plus any restitution, if there's any damage caused. Do you understand that's a possibility?

MR. HICKMAN: Yes.

THE COURT: And even though whatever your attorney may have told you about, advice she may have given you, or what the County attorneys agreed to recommend, none of those agreements are binding on me, and I

might give you the full sentence. Do you understand that's a possibility?

MR. HICKMAN: Yes, sir.

THE COURT: And that if I did give you the full sentence, then you decided it wasn't a good idea to plead guilty, it would be too late. You couldn't withdraw your plea anyway. Do you understand that?

MR. HICKMAN: Yes, sir.

THE COURT: Okay. Now, you're not under -- today under the influence of any drugs, alcohol or anything of that nature?

MR. HICKMAN: No, sir.

THE COURT: Taking any medication of any kind?

MR. HICKMAN: No.

THE COURT: Nothing that would affect your judgement in that way?

MR. HICKMAN: No, not that I know of.

THE COURT: You understand if you plead not guilty, you have a constitutional right to a trial by jury. We would bring the jury in here. I'd tell them that you are innocent until proven guilty. You'd be presumed innocent until proven guilty. The State has the burden of proving you are guilty, have to prove every element of the offense beyond a reasonable doubt. They'd have -- the jury would have to agree unanimously that you were guilty before you could be found guilty.

You'd have your attorney with you all through the trial, question any witnesses that the State produced. You could bring in witnesses if you wanted to. You could testify on your own behalf if you wanted to. You have all those rights. Do you understand that?

MR. HICKMAN: Yes, sir.

THE COURT: And then by pleading guilty, it's -- you waive all those rights so you are found guilty the same as if the jury found you guilty of Aggravated Robbery. Do you understand that?

MR. HICKMAN: Yes, sir.

THE COURT: Let me -- I want you to understand what the elements of the offense are, make sure you know what they'd have to prove.

They would have to prove that in Salt Lake County at about 965 South 2200 East, on or about November 1st, 1984, you unlawfully and intentionally took personal property in possession of A. W. Kelson or from his immediate person by threatening with some sort of a deadly weapon. They'd have to prove it was in Salt Lake County. They'd have to prove the date, prove you did it to A. W. Kelson. All those things they have to prove, all the elements that are read. Do you understand that?

MR. HICKMAN: Yes, sir.

THE COURT: Let me ask you this. Is the reason that you are pleading guilty of this charge because you are guilty of it?

MR. HICKMAN: Yes, sir.

THE COURT: All right. What's your level of education?

MR. HICKMAN: Twelfth.

THE COURT: And having finished twelfth grade, can you read and understand the English language?

MR. HICKMAN: Yes.

THE COURT: Have you had a chance to read that affidavit?

MR. HICKMAN: Yes, sir.

THE COURT: Okay. And do you understand what it says?

MR. HICKMAN: Yes.

THE COURT: Are you willing to sign it?

MR. HICKMAN: Yes.

THE COURT: And do you have any questions about it before you do?

MR. HICKMAN: No.

THE COURT: Okay. You can go ahead and sign it, then.

MS. WELLS: Your Honor, I would ask that the State make the Motion to amend that count --

MR. D'ELIA: Whenever you are ready, Judge.

THE COURT: All right. Go ahead.

MR. D'ELIA: The State would move at this time to amend Count III by crossing out on the third line up where it says a firearm, from that point, firearm, all the way through and substitute a deadly weapon by delineation.

THE COURT: All right.

MR. D'ELIA: And also to dismiss Counts I and II as pertains to Mr. Hickman, Mr. Dean Hickman, as party to the offense. And with respect to the other charges, as Ms. Wells represented, we would stipulate that that's the agreement, no other charges in connection with this offense will be filed.

THE COURT: The Motion will be granted.

Let me ask you Mr. Hickman, after everything we've said, you still want to plead guilty to this?

MR. HICKMAN: Yes, sir.

THE COURT: And then, let me ask you, how do you plead to the charge of Aggravated Robbery, a First Degree Felony, guilty or not guilty?

MR. HICKMAN: Guilty.

THE COURT: Okay. You can go ahead and sign that affidavit.

MS. WELLS: He has signed it, Your Honor, in open court. I would also indicate Mr. D'Elia has, and I have also signed the affidavit.

THE COURT: Based on the questions I asked Mr. Hickman, I find it's a plea entered freely and voluntarily, and I'm accepting the plea and signing the affidavit. It's my duty to sentence you in a time not sooner than two or later than 30 days unless those time periods are waived by you. What's your pleasure in that regard?

MS. WELLS: Your Honor, we would waive the minimum and ask the Court to impose sentence today. The Court may or may not know Mr. Hickman is presently on probation for a felony offense to Judge Banks. An Order to Show Cause has been filed in that matter, and we will be indicating to Judge Banks that this

plea will have been entered. Based upon that, we feel that there is no real benefit to be gained from asking for a pre-sentence report, and we would ask the Court to impose sentence today, understanding that the Court would have no alternative but to impose the statutory period of time.

MR. D'ELIA: That would be the request from the State to impose the maximum sentence.

THE COURT: I'm going to sentence you, Mr. Hickman, to serve a term in the Utah State Penitentiary of not less than five years nor longer than life, to be transported there forewith, I suppose.

MS. WELLS: One other matter. At the time both brothers, Hickman, were arrested, certain pieces of personal property, their clothing, were taken into evidence. I would ask the Court for an order releasing that either to them for transportation to the Utah State Prison with them or to a person of their choice since this is personal property, just items of personal property and clothing.

MR. D'ELIA: No objection to personal items.

THE COURT: That will be the Order.

(Whereupon the proceedings were concluded.)

* * *

Again, the above exchange between the Trial Court and the Defendant/Appellant clearly shows from a silent record that the Honorable Scott Daniels erred in his acceptance of the guilty plea entered by the Defendant/Appellant on January 18, 1985. It was the Trial Court's responsibility to notify the Defendant/Appellant of all the facts involved and the consequences the Defendant/Appellant would face on the entrance of a plea of guilty, and also the involved consequences of his guilty plea at the time of sentencing and the effect that it would have upon the Defendant/Appellant within the meaning of the Utah Code of Criminal Procedure, Section 77-35-11, Rule 11 - Pleas (e)(4)(6)(f), and also under the Utah Code of Rules of Practice, Rule 3.6, Pleas of Guilty(A)(B)(C)(D).

The Trial Court further violated the Defendant/Appellant's civil rights under the Eighth and Fourteenth Amendments to the United States Constitution, under the authority of Boykin v. Alabama, 395 U.S. 238 (1969), Brady v. United States, 397 U.S. 742 (1970), State v. Gibbons, 60 Utah Adv. Rep. 36, 37, 38 (June 30, 1987), and State v. Vasilacopulos, 756 P.2d 92 (Utah 1988).

The Defendant/Appellant should not have been allowed to have pled guilty in criminal case number CR-84-1436, in count number III, for the crime of aggravated robbery, a felony of the first degree. There was no factual basis for a plea of guilty to be entered by the Defendant/Appellant to a charge of aggravated robbery, a felony of the first degree, because, in fact, there was no property actually taken.

In State of Utah vs. Boyd Keith Hickman, in criminal case number CR-84-1436, in which happens to be the above named Defendant/Appellant's brother, charge with the same crime, it clearly states the following for the record in his transcript of hearing with respect to the taking of his guilty plea on page 8 of the transcript:

MR. FRATTO: Let me interject. I think he may hesitate, no property was actually taken. I think the statute allows -- in fact, I'm sure it allows the attempt to do such a thing --

THE COURT: Also --

MR. FRATTO: -- to use force and firearm to a robbery.

THE COURT: Okay.

MR. FRATTO: So they weren't perfectly clear, there was no property actually taken. (Tp 8)

The above exchange that occurred between the Trial Court and the

Defendant/Appellant's brother, Boyd Keith Hickman, clearly shows in the instant case that the Defendant/Appellant's plea of guilty could not or should not have been accepted by the Trial Court to the crime of aggravated robbery, a felony of the first degree. The record as a whole clearly demonstrates that the elements in the instant case at bar were not that of aggravated robbery, when there is clearly shown by the record that no property was actually taken as previously stated above.

Under the Utah Code of Criminal Procedure, 1986-1987, under Section 76-4-102, Attempt, Classification of Offenses, it allows for the following:

CRIMINAL ATTEMPT TO COMMIT:

(2) A felony of the first degree is a felony of the second degree;

The above clearly shows that the offense in the instant case at bar is one of attempted robbery, a felony of the second degree, as where there was no property taken.

Under the Utah Code, 1986-1987, it allows for the following with respect to Section 78-7-5, Powers of Every Court, which states in the pertinent part:

(8) To amend and control its process and orders so as to make them conformable to law and justice.

The above clearly shows that this Court has the power to correct an alleged error, and to furthermore change a sentence, to make it conformable to law and justice.

The Defendant/Appellant's brother, in State of Utah vs. Boyd Keith Hickman, in criminal case number CR-84-1436, also moved to withdraw his plea of guilty on the same identical grounds as

the Defendant/Appellant in the instant case now seeks to do. As previously stated by the Trial Court in State of Utah vs. Boyd Keith Hickman, the same would hold true in the Defendant/Appellant's case presently pending review by this Honorable Court. The following memorandum decision was given by the Trial Court on January 7, 1988, concerning the validity of the defendant's guilty plea in State of Utah vs. Boyd Keith Hickman, in criminal case number CR-84-1436, which states in the pertinent part:

This matter is before the court on Mr. Hickman's motion to revise his sentence from a second degree felony to a third degree felony. After reading the transcript of the change of plea, I am of the view that a sufficient factual basis was not established for either a plea of simple robbery, a second degree felony, or attempted aggravated robbery, a second degree felony. A factual basis was not established for the use of a firearm, which would have been required for the attempted aggravated robbery charge.

I do not believe this amounts to an illegal sentence, however. Rather, it amounts to an improperly taken guilty plea. Consequently, a proper procedure would be for Mr. Hickman to file a motion to withdraw his plea of guilty under Utah Code Ann., Section 77-13-6.

If Mr. Hickman desires to withdraw his guilty plea and entirely rescind the plea bargain, he should do so.

DATED this 7 day of January, 1988.

Scott Daniels
District Court Judge

On February 26, 1988, the above named defendant, Boyd Keith Hickman, appeared before the Trial Court and withdrew his plea of guilty based upon the aforementioned memorandum decision of that Honorable Court, dated on January 7, 1988. The same should hold true in the instant case of this Defendant/Appellant, as the record clearly shows that a factual basis was not found to support

the Defendant/Appellant's plea of guilty to the charge of aggravated robbery, a felony of the first degree. And further, the Trial Court erred in its acceptance of such a plea of guilty to a charge of aggravated robbery, a felony of the first degree.

The Defendant/Appellant above named is in belief that this Honorable Court may grant relief additionally, pursuant to the Constitution of the State of Utah, pursuant to the following Articles and Sections, which state in the pertinent parts:

Article I, Section 1, Declaration of Rights:

All men have the inherent and inalienable right to enjoy and defend their lives and liberties; and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I, Section 7, Due Process of Law:

No person shall be deprived of life, liberty, or property without due process of law.

Article I, Section 11, Courts Open-Redress of Injuries:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a remedy by due course of law.

Article I, Section 26, Provisions Mandatory and Prohibitory:

The provisions of this constitution are mandatory and prohibitory, unless be express words they are declared to be otherwise.

Article I, Section 27, Fundamental Rights:

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

The above cited pertinent parts of the Utah Constitution are, in fact, relevant to the Defendant's instant case at bar, and are

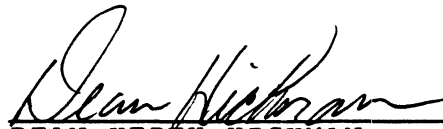
furthermore guaranteed to the Defendant/Appellant under Utah Constitutional Law.

CONCLUSION

Therefore, in conclusion of the facts as set forth above, the Defendant/Appellant now respectfully requests that this Honorable Court reverse the decision of the Trial Court and allow the Defendant/Appellant to withdraw his plea of guilty as prayed for herein.

DATED on this 30 day of October, 1988.

RESPECTFULLY SUBMITTED,



DEAN KEITH HICKMAN
Defendant/Appellant
Attorney Pro Se
Post Office Box 250
Draper, Utah 84020

CERTIFICATE OF SERVICE

I hereby certify that I have caused four (4) true and correct photocopies of the foregoing **BRIEF OF APPELLANT** to be mailed, postage prepaid, to the following on this 30 day of October, 1988.

- (1) **DAVID YOKUM**
Salt Lake County Attorney
240 East 400 South
Salt Lake City, Utah 84111



DEAN KEITH HICKMAN
Defendant/Appellant

A D D E N D U M S

In the District Court of the Third Judicial District Lake County Utah
State of Utah

JAN 18 1985

THE STATE OF UTAH,

Plaintiff

DEAN KEITH HICKMAN

vs.

Defendant

1. DEAN KEITH HICKMAN

H. Dixon Hindley, Clerk 3rd Dist. Court
By Harold Quirk
Deputy Clerk

Affidavit of Defendant

Criminal No. 84-1436

I, DEAN KEITH HICKMAN, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of:

AGGRAVATED ROBBERY (1 COUNT)

(Name of Crime)

Elements:

Δ UNLAWFULLY AND
INTENTIONALLY TOOK
PERSONAL PROPERTY
IN POSSESSION OF ANOTHER
AGAINST HIS WILL, BY
USE OF A WEAPON
DEADLY

Facts:

Δ, ON 11/1/84 AT 965 SO.
2200 EAST, Δ TOOK
PROPERTY OF A.W. NELSON
WITHOUT CONSENT BY USE
OF A DEADLY WEAPON

I have received a copy of the charge (information) and understand the crime I am pleading guilty to is a

FIRST DEGREE FELONY

(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be 5 YEARS TO LIFE

prison term. \$10,000 fine, or both. I am not on drugs or alcohol.

My plea of guilty is freely and voluntarily made. I am represented by Attorney BROOKE WELLS
who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2. I know that if I wish to have a trial, I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered.

7. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed on me.

Lia Bush

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|------------------|---|---------------------|
| STATE OF UTAH, | : | MEMORANDUM DECISION |
| Plaintiff, | : | CASE NO. CR-84-1436 |
| vs. | : | |
| BOYD K. HICKMAN, | : | |
| Defendant. | : | |

This matter is before the Court on Mr. Hickman's Motion to Revise his Sentence from a Second Degree Felony to a Third Degree Felony. After reading the transcript of the change of plea, I am of the view that a sufficient factual basis was not established for either a plea to simple Robbery, a second degree felony, or Attempted Aggravated Robbery, a second degree felony. A factual basis was not established that property was actually taken, which would have been required for the Robbery charge; a factual basis was not established for the use of a firearm, which would have been required for the Attempted Aggravated Robbery charge.

I do not believe this amounts to an illegal sentence, however. Rather, it amounts to an improperly taken guilty plea. Consequently, a proper procedure would be for Mr. Hickman to file a Motion to Withdraw his guilty plea under Utah Code Ann., Section 77-13-6. It appears that Mr. Hickman has received substantial benefit from the guilty plea in that a number of

other charges were dismissed. If Mr. Hickman desires to withdraw his guilty plea and entirely rescind the plea bargain, he should do so.

The Motion to Revise the Sentence, however, is denied. The attorney for the State of Utah is directed to prepare an appropriate Order.

Dated this 7 day of January, 1988.

61 Scott Daniels
SCOTT DANIELS
DISTRICT COURT JUDGE